

No. 10,359

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FLOTATION SYSTEMS, INC. (a corporation),
and UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY (a corporation),
Appellants,

VS.

UNITED STATES for use of ANDREW POLLIA,
T. G. SHANNON and B. W. MACKIE, co-
partners doing business under the ficti-
tious name and style of Shanmac Co.,
Appellees.

APPELLANTS' REPLY BRIEF.

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PAUL P. O'BRIEN,
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Appellants have no quarrel with and admit that the elementary principles of law cited by appellee in his brief are correct.

The appellants claim that the law cited by appellee is not applicable to the facts of the case. Appellee states, page 2 of his brief, that there were discussions prior to entering into the contract between Ceriat, Pollia and Snyder and that after said discussions Snyder drew up and typed a contract. Mr. Snyder's testimony on this question was to the effect (R. 167), that he had no discussion with Mr. Pollia or Mr.

Ceriat regarding the terms of the contract, but that after they had agreed upon the terms he merely went over the contract with a view of checking the wording to see if it read right. He further testified that he had no knowledge, at the time, what Mr. Pollia and Mr. Ceriat had agreed to. (R. 168.)

On page 3 of his brief appellee states that pursuant to a request he arranged for and obtained an itemization of work totaling four thousand seven hundred thirty-seven and 49/100 (\$4737.49) dollars. At Mr. Pollia's request an inventory of the work already done was prepared by Mr. Snyder (R. 162), and at page 193 of the record, Mr. Snyder testified as to what and why this inventory was made. His testimony is that Mr. Pollia stated that he was going to get paid for all of the work inside of the pits and he wanted an inventory of the work already performed by him and Mr. Snyder took an inventory of the work that he had done.

On page 194 he testified that Mr. Pollia was the first one to raise any question about payment for work inside of the pits and this inventory, that was made up by Mr. Snyder, had nothing to do with the item of four thousand seven hundred thirty-seven and 49/100 (\$4737.49) dollars. (R. 171.) This item was a number of payments which had already been made totaling that amount. (R. 74.)

Mr. Pollia, himself, testified that there were various checks that were issued totaling \$4737.49, which covered extra work orders and work performed pursuant to the contract. (R. 74.)

This amount of four thousand seven hundred thirty-seven and 49/100 (\$4737.49) dollars, was contained in the statement or letter of August 29th, and was listed therein as payment No. 2 (R. 208), which had been paid prior to this date. It therefore could not have been used as a basis for partial payment and the question raised with reference to work done in the pits was first raised by Mr. Pollia. (R. 194.) The reason for the payment of the one thousand (\$1000.00) dollars, is explained by Mr. Kalte. (R. 229.)

Running through the entire record there is the undisputed evidence that for each and every bit of work which Mr. Pollia did, which under his interpretation was not included in the contract, that before the doing thereof he demanded an extra work order and never having demanded an extra work order for the doing of the work inside of the pits shown on the plans and specifications, it is conclusive that he at all times up until the discussion arose, interpreted the contract to mean that he was to do this work. The undisputed testimony is, that he had performed approximately 80% of this work before this discussion arose. (R. 137.)

Appellants submit that there is no evidence to sustain the findings or the judgment.

Dated, San Francisco,
May 21, 1943.

Respectfully submitted,

JOHN D. HARLOE,

Attorney for Appellants.

